NATIONAL WILDLIFE FEDERATION

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-547 Decided May 27, 1999

Appeal from a decision by the Assistant Director for Field Operations, Office of Surface Mining Reclamation and Enforcement, not to order a Federal inspection of coal mining operations currently owned or controlled by Rapoca Energy Company. 94-40-RAPOCA; 95-11-2RAPOCA.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Successor Corporation

   Under 30 C.F.R. § 773.5(b) (1994), one entity may "control" another where it has "authority" to determine the manner in which mining operations are conducted. A successor corporation to a controlling entity, however, is not liable for its predecessor's violations under the AVS when the successor purchases the assets of that controlling entity under circumstances where the original corporate entity continues, where the asset acquisition agreement is specific in listing only assets and liabilities other than those related to the subject violations under the AVS, where the buyer makes substantial changes in the use of the assets obtained from the predecessor corporation, where the employee leadership complement is changed from that of the prior operation, and where the purchaser bought the business without knowledge of the unlawful acts of the predecessor.

APPEARANCES: Walton D. Morris, Jr., Esq, Charlottesville, Virginia, and L. Thomas Galloway, Esq., Galloway and Associates, Washington, D.C., for Appellant; Courtney W. Shea, Esq., Office of the Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE TERRY

National Wildlife Federation (NWF or Appellant) has appealed the March 16, 1995, decision of the Office of Surface Mining Reclamation and Enforcement (OSM) declining to order a Federal inspection of operations currently owned or controlled by the Rapoca Energy Company (Rapoca II), the 1980 purchaser of assets owned by the Rapoca Energy Corporation (Rapoca I). OSM determined that no control link existed between Rapoca II and Maco Coal, Inc. (Maco), a contractor with existing outstanding violations, under the Applicant/Violator System (AVS). The decision followed an OSM investigation of allegations by Appellant that Rapoca II bears corporate successor liability for uncorrected violations and unpaid civil penalties associated with surface coal mining operations that Maco conducted as a contractor for Rapoca I and its affiliates.

The AVS is a computerized system maintained by OSM to identify ownership and control links involving permit applicants, permittees, and persons cited in violation notices. See 30 C.F.R. § 773.5 (59 Fed. Reg. 54352 (Oct. 28, 1994)). The AVS includes information about past and current holders of surface mining permits, their owners, operators, and corporate directors, and officers. It allows information about permit applicants to be reviewed to find relationships to entities that have unresolved problems under the surface mining laws, including unabated violations, unreclaimed areas, delinquent civil penalties, and unpaid abandoned mine land (AML) fees. See generally The Pittston Co. v. Lujan, 798 F. Supp. 344, 345-47 (W.D. Va. 1992). The word "link" is used within the AVS to indicate a connection between two parties. 1/

A review of the governing statute and regulations will provide a background to understand the AVS link prior to setting forth the decision appealed from and the arguments of the parties. Section 510 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires an applicant for a surface coal mining operation permit to file

> a schedule listing any and all notices of violations of this chapter and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the regulatory authority indicates that any

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1/ Under the current regulations, the term "ownership or control link" is defined very generally to "mean any relationship included in the definition of `owned or controlled' or `owns or controls'" in 30 C.F.R. § 773.5 or in the violations review provisions of 30 C.F.R. § 773.15(b). 30 C.F.R. § 773.5 (59 Fed. Reg. 54352 (Oct. 28, 1994)).

> surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation.

30 U.S.C. § 1260(c) (1994) (emphasis supplied). 2/

Under 30 C.F.R. § 773.15(b)(1), a regulatory authority reviewing a permit application "shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of [SMCRA] or any other law, rule or regulation referred to" in that paragraph. The paragraph contains a reference to "delinquent civil penalties issued pursuant to section 518 of" SMCRA. Thus, being linked to a party with outstanding violations or delinquent civil penalties prevents an entity from receiving any new surface coal mining permits. In this way, the AVS attempts to gain compliance with SMCRA by denying additional permits to parties in control of entities that remain in violation of SMCRA and other laws. 3/

NWF asserts that, at the time of the OSM decision, Maco had unresolved violations and unpaid civil penalties, including principal and interest. Rapoca I has been linked to Maco under the AVS. This fact is not disputed by the parties. NWF seeks to have the link extended to Rapoca II under the doctrine of corporate successor liability.

In the March 16, 1995, decision letter (March 16 Decision) to NWF's counsel from which this appeal is taken, the OSM Assistant Director of Field Operations stated, in pertinent part:

> This responds to your January 12, 1995, request for informal review on behalf of the National Wildlife Federation (NWF). You

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2/ See also 30 U.S.C. §§ 1257(b)(4) (requiring, in some circumstances, a permit applicant that is a partnership, corporation, association, or other business entity, to identify any person "owning" stock) and § 1257(b)(5) (1994) (requiring a statement of whether persons "controlled by or under common control with the applicant" have held a permit that has been suspended or revoked or had a mining bond forfeited in the 5 ! year period before the permit application was suspended).

3/ The effect of these provisions is to require an applicant to assume responsibility for unresolved violations committed by an entity that the applicant "owns or controls," or to take steps to satisfy the regulatory authority that the violations are being corrected, before a permit can be issued to that applicant. Applicants who are denied permits are said to be "blocked."

> requested a review of the Big Stone Gap Field Office's (BSGFO) unwritten decision not to conduct an immediate Federal inspection of operations allegedly owned or controlled by Rapoca Energy Company. * * *
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> On July 7, 1994, the BSGFO requested that the Applicant/ Violator System Office (AVSO) evaluate the State of Virginia's response regarding the alleged ownership or control link between Rapoca Energy Corporation (Rapoca I), Rapoca Energy Company (Rapoca II) and Maco Coal Company. The AVSO determined that the ownership or control allegations and the rebuttal evidence required a thorough investigation with the assistance of the Knoxville Field Solicitor's Office.
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> On January 25, 1995, the AVSO sent the results of their investigation to the BSGFO Director, and subsequently, on February 8, 1995, the BSGFO Director provided you with those results. In short, the AVSO, assisted by the Knoxville Field Solicitor's Office, has concluded that Rapoca II successfully rebutted the alleged ownership and control link with Maco Coal Company.
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> Accordingly, I am denying your request for informal review since the AVSO has already conducted an extensive investigation and analysis of this case and determined that the alleged ownership or control link does not exist. Such investigation took into account the allegations and information which you presented.

(March 16 Decision at 1-2.)

In its Statement of Reasons (SOR) for appeal, Appellant urges that Rapoca II's acquisition of Rapoca I's assets implicates two of the exceptions to the general rule that asset acquisitions do not impose the seller's liabilities on the purchaser. (SOR at 10.) First, Appellant claims, the transaction meets the Secretary of the Interior's (Secretary's) special test for successor liability at surface coal mining operations because it included the Maco minesites and all of Rapoca I's mining and reclamation equipment. Id. Second, NWF asserts, the transaction conveyed Rapoca I's business as a going concern and therefore meets the more general "continuing business enterprise" test for successor liability. Id. Either of these exceptions, considered independently, Appellant argues, required OSM to "hold Rapoca II responsible for reclaiming Maco's mines." Id.

In examining the first exception, Appellant notes that the preamble to the Secretary's AVS ownership and control regulations requires OSM to hold successor corporations responsible for the reclamation obligations of those from whom they acquire assets whenever the acquisition includes

both a minesite in need of reclamation and the seller's mining and reclamation equipment. (SOR at 10.) Appellant quotes the following preambular language:

> [I]f the assets purchased [in a business transaction] include the mine site and equipment where outstanding violations exist, the acquiring company would be responsible for the violations under the theory that the acquiring company has purchased the liabilities in connection with the transferred assets of the other entity and that the purchase price for the entity would reflect any liabilities transferred.

(SOR at 10-11 (emphasis supplied), citing 53 Fed. Reg. 38876 (Oct. 3, 1988).) 4/ From this, Appellant argues, transactions that include both minesite and mining equipment always result in successor liability, regardless of whether the transaction qualifies under any other test. (SOR at 11.)

Equally important, NWF states, it is irrelevant whether the acquiring company has acquired the violator's (Maco's) equipment, as the only requirement for successor liability is that it acquire the controlling corporation's (Rapoca I) equipment. Id. In that regard, Appellant claims, acquisition of a selling company's equipment gives the buyer the ability to correct any violations on property that the seller no longer owns. (SOR at 12.) Appellant claims that the focus of Virginia officials on Maco's mining equipment misapplies the Secretary's regulations "in a way that would allow coal operators to avoid transferring reclamation responsibilities to a successor company simply by moving all of a contractor's equipment off the site of an environmental disaster before selling the site and all of the mineral owner's mining equipment." (SOR at 13.) Thus, Appellant claims, when Rapoca I transferred the Maco minesites and all of the interest in its mining equipment to Rapoca II in 1980, the asset acquisition met the Secretary's special test for imposing successor liability, and OSM has erred in finding that Rapoca II has effectively rebutted its presumed ownership or control over Maco's minesites. (SOR at 13-14.)

Independent of the Secretary's special test for successor liability, NWF claims the 1980 Rapoca II asset acquisition satisfies the "continuing

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4/ The Secretary's subsequent interim final rulemaking adopting replacement ownership or control regulations, 62 Fed. Reg. 19450-19461 (Apr. 21, 1997), makes clear that the replacement rules "preserve those aspects of the [Secretary's 1988 ownership or control regulations] to which [the United States Court of Appeals for the District of Columbia Circuit] expressed no specific objection" in its decision in National Mining Association v. U.S. Dept. Of the Interior, 105 F.3d 691 (D.C. Cir. 1997). Nothing in the Court of Appeals' decision specifically objects to the principles of successor liability that the Secretary announced in his 1988 rules.

business enterprise" test that the Supreme Court approved in Golden State Bottling Co., Inc. v. National Labor Relations Board, 414 U.S. 168, 180 (1973). Appellant notes that the Secretary cited the Golden State Bottling decision in the preamble to the ownership and control regulations as a recognized exception to the general rule disfavoring successor liability. (SOR at 14.) Appellant states that the Golden State Bottling decision applies where a purchaser "acquires and continues the business [of a predecessor] with knowledge that his predecessor has committed an unfair labor practice." (SOR at 14, quoting Golden State Bottling, supra at 170.) Moreover, NWF claims, at the time of the asset transfer, Rapoca II knew or should have known of the existence of Maco's violations. Appellant states that "[t]he federal cessation orders and the Virginia bond forfeiture were matters of public record" and "[d]ue diligence in such an acquisition either actually informed or should have informed Rapoca II of the existence of outstanding remedial orders covering the property it acquired." (SOR at 15.)

In its Response, OSM explains in some detail its actions in responding to Appellant's initial complaint filed on April 1, 1994. OSM states that NWF's Citizen's Complaint requested that OSM "conduct a nationwide inspection of the operations and permits held by Rapoca Energy Corporation [Rapoca I]" and that "OSM (1) block Rapoca Energy Corporation from receiving permits, (2) rescind outstanding permits unless the violations were corrected and the penalties paid, and (3) cite Rapoca Energy Corporation for violating 30 CFR 778.13(d) and the Virginia counterpart regulation. (506-514.)" (Response at 1-2.) OSM treated the NWF's complaint as a request to link the more active Rapoca II to Maco. (Response at 3, citing Record at 260.) OSM states that it issued "ten-day notices" to the Virginia Regulatory Authority, the Division of Mined Land Reclamation (DMLR) advising that agency that the Secretary of the Interior "had reason to believe" that Rapoca II and its affiliates had failed to list Maco as an operation "owned or controlled by the applicant or by any person who owns or controls the applicant." (Response at 2, quoting from Record at 471-505.)

OSM relates that it then began its own investigation of the ownership and control allegation. (Response at 2, citing Record at 470.) OSM states that it had investigated linking Maco to Rapoca II in 1991, and had not linked the two companies. (Response at 3, citing Record at 260-312.) It further states that DMLR began investigating Rapoca II in early 1994 and had sent a letter to Rapoca II indicating that the agency had enough information to raise a presumption that Rapoca II "owned or controlled" Maco. Id., citing Record at 196. OSM and DMLR both contacted Rapoca II, who supplied documents and arguments concerning its purchase of assets from Rapoca I. Id., citing Record at 34-39, 216-217, 221-222, 230-236, 245, 249-252, 257-259, 649-650.

DMLR responded to OSM's ten-day notice on July 5, 1994, finding that Rapoca II should not be linked to Maco. (Response at 3.) DMLR found:

> There are no common owners, officers or directors between either Rapoca Energy Company and Rapoca Energy Corporation and Maco. Rapoca Energy Company did not acquire Maco's permit right, its permit, nor any other asset it may have had. Rapoca Energy Company cannot in fact have the authority directly or indirectly to determine the manner in which "the Maco" surface coal mining operation [was] conducted.

(Response at 3-4, quoting Record at 196.) OSM then requested that its AVS Investigation Branch evaluate the DMLR findings. (Response at 4.) On July 20, 1994, Appellant appealed to the OSM Regional Office from an unwritten OSM decision not to conduct an immediate Federal inspection of operations owned or controlled by Rapoca II. Id. OSM advised NWF by letter on July 29, 1994, that NWF's request had been premature and that OSM's AVS Investigation Branch was reviewing the DMLR findings. Id.

On January 12, 1995, NWF requested informal review of OSM's unwritten decision not to conduct an inspection in response to its April 1, 1994, Citizen's Complaint. (Response at 5.) On March 16, 1995, the Assistant Director for Field Operations denied the request for informal review because the AVS "had already conducted an intensive investigation and analysis of this case and determined that the alleged ownership or control link does not exist." (Response at 6-7, quoting from March 16 Letter.)

In its Response, OSM describes the relationship between Rapoca I and Rapoca II. Rapoca I was a Delaware corporation in existence prior to 1980 which owned, among its subsidiaries, Norton Coal Company. Norton Coal Company was the sole owner of Banner Splashdam Coal Company. (Response at 7.) On February 15, 1980, Rapoca II entered into an "asset purchase agreement" with Rapoca I, Norton Coal Company and other companies. Id., citing Record at 273-300. Section 2 of the agreement described the purchase of assets, which were limited to the assets associated with the ongoing business. Id. at 7-8. Section 2 contained no mention of Maco. Section 3.03(a) of the agreement provides that Rapoca II shall assume "only those liabilities listed or described in the schedule to this subsection (a)" and assume or perform the liabilities described in subsection (b). (Response at 8.) OSM states, and the Record reflects, that the schedules to section 3.03(a) and (b) do not include any reference to Maco, or to properties mined by Maco. Id.

OSM states that subsequent to the sale of assets to Rapoca II, the United States sued Rapoca I for unpaid AML fees incurred prior to the 1980 sale, including an allegation that Rapoca I was responsible for fees on the coal mined at a Maco minesite. (Response at 8, citing Record 544-561.) Rapoca I settled this suit. (Response at 8.) Rapoca II also entered into a comprehensive settlement agreement with OSM in 1988 concerning collection of AML fees on minesites associated with Rapoca II after July 1980, but the agreement does not include any Maco violations, fees, or penalties. (Response at 8-9, citing Record at 515-542.) OSM notes that Rapoca II

disclaims any association with Maco or its assets. (Response at 9, citing Record at 32-[39], 216-217, 221-222, 231-236, 249-252, 267-269, 568-570, 588-592, 649.) OSM further states that Rapoca I and Rapoca II have no common officers, directors, or owners, and that Rapoca I was active in the 1980's as indicated by its settlement of its reclamation obligations at that time. (Response at 9.)

In its Response, OSM describes Maco as a Virginia Corporation, incorporated in 1976, which entered into a coal production agreement as a contract miner on July 17, 1976, with Rapoca I, Norton Coal Company and Banner Splashdam Coal Company. Maco mined coal in 1977 and 1978. (Response at 10.) The July 17, 1976, agreement recited that Maco retained control of the mining operation, was to comply with all applicable laws, and obtain permits at its own expense. (Response at 10, citing Record at 680-688.) A second agreement between the parties was negotiated on June 1, 1977. See Exh. A to Response. In this agreement, Rapoca I did not guarantee to buy the coal but Maco was required to sell the coal "to or through Banner" and to load it at the Banner tipple. The method of compensation was changed to a flat payment rate of $15.25 per net ton of coal mined and Norton would no longer charge Maco for its engineering services. (Response at 10.)

Three of Maco's permits on which violations occurred were associated with mining operations after the passage of SMCRA, and are thus relevant to this case. These were permits 2514, 2398, and 2515. Permit 2515 was issued February 2, 1978, and noncompliance orders were issued on May 25, 1978. There was no attempt to abate prior to abandonment, and the state revoked the permit and recommended bond forfeiture on September 7, 1978. Id., see Record at 404-06; 692. Permit 2514 was issued on February 2, 1978, and the permit was abandoned by November 1978. (Response at 10-11, citing Record at 374.) Permit 2398 was issued June 24, 1977. Bond forfeiture proceedings were commenced on permit 2514 on April 18, 1979, and on permit 2398 on September 1, 1978. (Response at 11, citing Record at 406.) Both bonds were forfeited. Id.

In a post-judgment interrogatory, Buford Mullins, President of Maco, stated that the corporation went out of business in 1978, and that all property and coal were leased from Norton Coal Company. (Response at 11, citing Record at 694-700.) In his affidavit, Mullins stated that Maco used its own equipment in the mining operations, having purchased it from various sources, including Norton Coal Company, a subsidiary of Rapoca I. He stated that Maco sold all its mining equipment to entities unrelated to Rapoca I at the conclusion of its mining operations in 1978. (Response at 11, citing Record at 633-34.)

In the Response, OSM notes that NWF sets forth facts in its SOR which are disputed by OSM. The two main disputed facts are: (1) whether Rapoca I continued to have an interest in the property on which Maco conducted its mining operations when it transferred its property to Rapoca II, and (2) whether OSM had imposed successor liability on Rapoca II in previous settlements. (Response at 12.) Inherent in this dispute is the

implicit suggestion by Appellant that if Rapoca I no longer had an interest in Maco violations after the 1980 transaction, then clearly Rapoca II did; and the suggestion that if Rapoca II was held liable as corporate successor for other violations occurring prior to 1980, then that same rationale should apply to the Maco violations. NWF moved for a fact-finding hearing concerning these disputed facts, and OSM has objected based on its view that a thorough investigation of all available facts has been conducted by State and OSM officials, that there has been no showing that any additional information exists beyond that presented in the record, and that there is already evidence in the record concerning these matters. For the following reasons, we find a fact-finding hearing to be unnecessary.

The Board will refer a matter to an administrative hearing if there is disputed evidence regarding a material fact. Richard Gehres, 141 IBLA 185, 188 (1997). An inquiry to be made in determining whether a hearing is warranted is whether an administrative law judge would be better able to make a reasoned decision on the basis of an oral hearing than the Board can make on the existing record. NWF has made no offer of further evidence. A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the appeal. See Natec Minerals, Inc., 143 IBLA 362, 373-74 (1998) and cases there cited. This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977). In this case, there is only speculation that any additional evidence might be produced at a hearing. There is evidence in the record that the settlement between OSM and Rapoca I, after the 1980 transaction, charged continuing Rapoca I liability for violations on permit 2398 by Maco. See Record at 545. Additionally, there is evidence in the record that OSM did not impose successor liability on Rapoca II for violations of other Rapoca I contractors occurring before 1980. The Record establishes that the 1988 settlement with Rapoca II only addressed violations occurring after the second quarter of 1980, thus successor liability for violations occurring prior to the asset acquisition was not considered. See Record at 535-537; see also Affidavit of Charles P. Gault, Record at 515. For these reasons, Appellant's request for an evidentiary hearing is denied.

OSM's Response addresses Appellant's claim that the Board should determine liability for pre-1980 Maco violations to reside within Rapoca II under the doctrine of corporate successorship. OSM states that its investigation did not establish facts proving successor liability. (Response at 15.) OSM observes that Appellant's claim that the Preambular language it quoted required successor liability, in cases where equipment and minesites are acquired, presumed that the company acquires only assets, a condition not included in the restatement by NWF. (Response at 16.) In addition, OSM states:

> The Preamble discussion was not intended to create agency policy but to discuss the probable application of rules to particular

> fact situations. As noted in the following paragraphs of the preamble, the law of successor liability is complex and is considered an exception to the general rule that a buyer is not liable for liabilities if it purchases only the assets of another company.

(Response at 16.) OSM further notes that the areas mined by Maco were never redisturbed by Rapoca II and no facts were discovered during the investigation of Rapoca II that supported NWF's statement that Rapoca II acquired these minesites. (Response at 16.) Finally, OSM claims the review of the law cited by Appellant, and specifically the Golden State Bottling Co. case, does not support a determination that the "continuing business enterprise" test has been met in the asset acquisition by Rapoca II. OSM states that while the preambular language indicates that liability exists where "the purchasing corporation is merely a continuation of the transferor corporation," this test simply does not apply to the facts of the Rapoca transaction, where both the old and new corporations existed and functioned separately after the purchase. (Response at 18.)

We first examine the claim by Appellant that Rapoca II acquired minesites of Maco and equipment of Rapoca I as part of the 1980 acquisition, thus making it liable per se, according to Appellant, under the Secretary's special test for corporate successor liability set out in the Preamble to the AVS regulations. While preambular language provides guidance and examples, we do not find it to be regulatory in nature. However, even under the test as posited by Appellant, we note that no Maco assets or minesites are listed as having been transferred in the 1980 agreement. The schedule of Rapoca I liabilities listed as transferred in section 3 does not list any Maco violations. We look next to the statements of the parties to the agreement. Rapoca II claims that it did not receive Maco minesites and Maco's President states in his affidavit that the company went out of business in 1978, and that all its equipment was sold at that time to buyers that did not include Rapoca I. Rapoca I, not Rapoca II, was cited by OSM for Maco's pre-1980 violation in the settlement agreement reached between Rapoca I and OSM after the 1980 sale. No minesites of Maco were redisturbed by Rapoca II after the transaction. This was not true of those sites held by Rapoca I that were acquired by Rapoca II and mined as part of its acquisition, as identified in the record. We find nothing in the comprehensive record established, or in the reports of the investigations conducted by DMLR and OSM, that satisfies us that any evidence exists that Rapoca II acquired Maco's minesites in the 1980 asset acquisition. For this reason, we determine that Rapoca II was not a successor corporation with liability for any remaining Maco violations under the first of the exceptions cited by Appellant.

[1] We next address the asset acquisition by Rapoca II in the context of the "continuing business enterprise" exception. Under 30 C.F.R. § 773.5(b) (1994), one entity may "control" another, and thus be liable for its violations under the AVS, where it has "authority" to determine

the manner in which mining operations are conducted. A successor corporation, however, is not liable as a continuing business enterprise for its predecessor's violations when the successor purchases the assets of that controlling entity under circumstances where the original corporate entity continues, where the asset acquisition agreement is specific in listing only assets and liabilities other than those related to the subject violations under the AVS, where the buyer makes substantial changes in the use of the assets obtained from the predecessor corporation, where the employee leadership complement is changed from that of the prior operation, and where the purchaser bought the business without knowledge of the unlawful acts of the predecessor. See Golden State Bottling Co., Inc. v. National Labor Relations Board, supra; Kemos, Inc. v. Bader, 545 F.2d 913 (5th Cir. 1977); Pulis v. United States Electrical Tool Co., 561 P.2d 68 (Ok. 1977), cited in preamble to AVS regulations.

In the present case, Rapoca II's asset acquisition from Rapoca I did not represent a continuation of the corporate entity represented by Rapoca I. The facts establish that the old and new corporations were separate entities, both of which existed and functioned after the sale of assets. Courts have long held that liability for the corporation purchasing assets of a selling corporation is not determined by the continuity of a business operation but rather by determining whether the purchaser continues the corporate entity of the seller. Forest Laboratories, Inc. v. Pillsbury Company, 452 F.2d 621 (7th Cir. 1971); West Texas Refining & D. Co. v. Commissioner of Int. Rev., 68 F.2d 77 (10th Cir. 1933); Lopata v. Bemis Company. Inc., 383 F. Supp. 342 (E.D. Pa. 1974); Mitford v. Pickett, 363 F. Supp. 975 (D.C. Ill. 1973); Pulis v. United States Electrical Tool Co., 561 P.2d 68 (Ok. 1977).

The second test for successor corporate liability under the "continuing business enterprise exception" is established by Golden State Bottling, supra, decided under the National Labor Relations Act. In Golden State Bottling, the purchaser of a bottling firm was held liable as corporate successor for failing to implement a reinstatement order issued by the National Labor Relations Board to its predecessor. The Supreme Court examined the transaction to determine whether the purchasing firm had "continued after the acquisition to carry on the business without interruption or substantial changes in method of operation, employee complement, or supervisory personnel." Id. at 171. The Court found the purchaser liable under the above circumstances where it acquired the business with knowledge of the outstanding violation. Id. None of the Golden State factors apply in this case. The Record in this case reflects that activities of the new firm started up immediately upon purchase of Rapoca I's assets, but that Rapoca I continued as a corporate entity. The Record further reflects that Rapoca I and Rapoca II have no common officers, directors, or owners, and that only five of Rapoca I's senior employees with employment contracts were hired by Rapoca II, and with only three retaining their former positions. More importantly, the mining operation was upgraded significantly in the two Virginia counties in which Rapoca II operated, with new facilities constructed in both. Finally, there is not one scintilla of evidence

in the record that Rapoca II was aware of the existence of Maco violations, and we find that Rapoca II was reasonably entitled to rely upon the representations in section 3 of the 1980 Acquisition Agreement that the liabilities listed, which nowhere mentioned Maco, represented all known violations to be attributed to Rapoca I. We thus find the Golden State Bottling test for corporate successor liability to be inapplicable to the facts in this case.

The third test for successor corporate liability under the "continuing business enterprise exception" is established in Kemos, Inc. v. Bader, 545 F.2d 913 (5th Cir. 1977). In Kemos, the 5th Circuit addressed a purchase of all assets of a going concern where, as here, both corporations remained in existence after the transaction. In finding no liability in the buyer for obligations of the seller company not specifically assumed in the contract, the Court found Appellant Bader retained all his remedy's against the corporate predecessor. Id. at 915. We similarly find, under the facts of this case, that Rapoca II does not bear liability for obligations not assumed in the contract. Appellant, as in Kemos, may seek its remedy against Rapoca I.

For the reasons set forth above, we do not find Rapoca II liable as a corporate successor for Maco's violations while Maco was a contract miner for Rapoca I prior to the 1980 acquisition agreement. As stated above, the request for an evidentiary hearing is denied.

To the extent not specifically addressed herein, the parties' arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge